



The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference

Volume 54 (2011)

Article 19

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Citation Information

Wilkins, Kerry. "Dancing in the Dark: of Provinces and Section 35 Rights After 2010." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 54. (2011).

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Dancing in the Dark: Of Provinces and Section 35 Rights After 2010

Kerry Wilkins*

I. THE ANTINOMY¹

The bad news is that we still do not know all that we really need to know about provincial capacity and the rights recognized and affirmed in section 35 of the *Constitution Act, 1982*.²

1. The One Hand

On the one hand, the Supreme Court has told us that “[t]he text and purpose of s. 35(1) do not distinguish between federal and provincial laws which restrict aboriginal or treaty rights, and they should both be subject to the same standard of constitutional scrutiny”³ and, on several occasions now, that justified provincial interference with Aboriginal rights, at least, is constitutionally permissible.⁴ In none of these decisions

* Of the Ontario Bar. These are, of course, personal views, not necessarily those of any of my clients or employers, past, present or future. Special thanks to Ben Berger and to the indefatigable Kent McNeil, whose careful review of an earlier draft resulted, as usual, in very helpful suggestions for improvement, and to Kristina Gill and Hue Nguyen, whose research assistance on a different project proved very fruitful for this one.

¹ Thanks to Dwight Newman for reminding me of this perfectly apposite word.

² Being Schedule B of the *Canada Act, 1982* (U.K.) 1982, c. 11 [hereinafter “*Constitution Act, 1982*”].

³ *R. v. Côté*, [1996] S.C.J. No. 93, [1996] 3 S.C.R. 139, at para. 74 (S.C.C.) [hereinafter “*Côté*”]. Compare *Paul v. British Columbia (Forest Appeals Commission)*, [2003] S.C.J. No. 34, 2003 SCC 55, [2003] 2 S.C.R. 585, at para. 24 (S.C.C.) [hereinafter “*Paul*”] (“Section 35 ... applies to both [the] provinces and the federal government”).

⁴ See *Côté, id.*, at para. 74; *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010, at para. 160 (S.C.C.) [hereinafter “*Delgamuukw*”]; *Paul, id.*, at paras. 24-25. It is interesting to observe in each case how the Court arrived at this conclusion. In *Côté, id.*, the Court relied on *R. v. Badger*, [1996] S.C.J. No. 39, [1996] 1 S.C.R. 771 (S.C.C.) [hereinafter “*Badger*”] for support. *Badger* is indeed a case about a provincial law, and does say (at para. 85, as the Court in *Côté* correctly notes) that infringement of the relevant rights must be justified. But *Badger*, first, is a case about a treaty right, not an Aboriginal right, and second, is a case that turns crucially on the special constitutional powers conferred on the province of Alberta by para. 12 of the *Alberta Natural*

was it necessary for the Court to pronounce upon this issue,⁵ but sooner or later, other things equal, by dint of repetition alone, this dictum could become the law. In the single case to date in which the Court did find a provincial law to infringe an Aboriginal right,⁶ the Court proceeded in a manner consistent with this understanding of things.⁷ Conclusions in other decisions also support, or at least bespeak, this general view. In *Delgamuukw*,⁸ the Court, when listing legislative objectives sufficient to anchor justified infringements of Aboriginal title, included among them several that lie well within provincial legislative authority.⁹ And in *Haida*,¹⁰ the Court left no doubt that the provincial, as well as the federal Crown, must consult with relevant Aboriginal communities before engaging in conduct that might adversely affect credibly claimed Aboriginal rights.¹¹ This conclusion, at a minimum, makes a good deal more sense if one accepts that provinces have at least some constitutional capacity to affect such rights adversely. Finally, a rule that allowed for justified provincial infringement of treaty and Aboriginal rights would have certain evident practical advantages. One is simplicity: everyone would know at a glance exactly what the game was and be able to proceed accordingly. Another is that such a dispensation would make it safer for courts to be generous about accrediting claims of treaty or

Resources Transfer Agreement, 1930 ("NRTA"), Schedule 2 to the *Constitution Act, 1930* (U.K.), 20-21 Geo. V, c. 26, and s. 1 of the *Constitution Act, 1930*: see *Badger*, at para. 47. But for that special authority, the analysis and outcome in *Badger* might well have been different: see *Badger*, at para. 69. *Delgamuukw*, *id.*, in turn, relied entirely on *Côté* as support for this proposition. And the Court in *Paul* relied (at para. 25) on *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075 (S.C.C.) [hereinafter "*Sparrow*"], "for the proposition that government regulation, including provincial regulation, may, by legislation, infringe an aboriginal right if that infringement is justified". But *Sparrow* is a case concerned exclusively with federal, not provincial, regulation of an Aboriginal right and did not consider, nor need to consider, the relationship between provincial legislation and Aboriginal rights.

⁵ In *Côté*, *id.*, the Court concluded (at para. 77) that the only relevant provincial regulation did not infringe the relevant Aboriginal right; in *Delgamuukw*, *id.*, the Court concluded (at paras. 73-108) that it was necessary to send the case back to trial to ascertain whether the Aboriginal right at issue — Aboriginal title, in that instance — existed; and in *Paul*, *id.*, the issue before the Court was not whether any provincial legislation infringed the appellant's Aboriginal rights.

⁶ *R. v. Sappier; R. v. Gray*, [2006] S.C.J. No. 54, 2006 SCC 54, [2006] 2 S.C.R. 686 (S.C.C.) [hereinafter "*Sappier*"].

⁷ See *id.*, at para. 55 (the Crown offered no justification for the infringement). Again, therefore, it was not necessary for the Court to consider whether justified provincial infringement is constitutionally permissible.

⁸ *Supra*, note 4.

⁹ *Id.*, at para. 165.

¹⁰ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.) [hereinafter "*Haida*"].

¹¹ See *id.*, at paras. 57-59.

Aboriginal rights. The stakes in such adjudications increase considerably if section 35 rights, once acknowledged to be in effect, enjoy what amounts to all but absolute immunity from meaningful provincial interference.¹²

2. The Other Hand

On the other hand, no one has yet succeeded in identifying a plausible source of any provincial constitutional capacity to infringe, even in justified ways, existing treaty or Aboriginal rights.¹³ With the arguable exception of those in *Haida*,¹⁴ the Supreme Court's pronouncements on section 35 and provincial authority in the cases cited above rely on weak judicial authority¹⁵ and offer little in the way of supportive legal reasoning. This in itself would not be a problem were there not real reason elsewhere in Canadian constitutional law to question the provinces' *general* capacity to infringe, with or without justification, the kinds of rights that section 35 now recognizes and affirms.¹⁶ But as it happens, there is.

¹² On this last issue see, e.g., W.I.C. Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1990) 15 Queen's L.J. 217; Kerry Wilkins, "Judicial Aesthetics and Aboriginal Claims", in Kerry Wilkins, ed., *Advancing Aboriginal Claims: Visions; Strategies; Directions* (Saskatoon: Purich Publishing, 2004), at 300-302; Kerry Wilkins, "*R. v. Morris*: A Shot in the Dark and Its Repercussions" (2008) 7 Indigenous L.J. 1, at 33-35 [hereinafter "Wilkins, 'Morris'"].

¹³ By contrast, an obvious source of independent federal authority to infringe s. 35 rights and to constrain their exercise is s. 91(24) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [hereinafter "*Constitution Act, 1867*"], which confers on the federal order of government exclusive authority to make laws about matters relating to "Indians, and Lands reserved for the Indians". This and other "[f]ederal legislative powers continue" despite s. 35 of the *Constitution Act, 1982*, subject only to the requirement that Canada justify federal legislation and government action that infringes s. 35 rights: *Sparrow*, *supra*, note 4, at 1109.

¹⁴ *Supra*, note 10.

¹⁵ For elaboration, see *supra*, note 4.

¹⁶ One must speak here of provinces' *general* capacity, or lack thereof, to infringe because there are specific exceptions to the proposition in the text. According to para. 12 of the Alberta and Saskatchewan NRTAs and para. 13 of the Manitoba NRTA, provincial "laws respecting game in force ... from time to time" in those provinces "shall apply to the Indians within the boundaries thereof", subject to certain important limits also set out there. By virtue of s. 1 of the *Constitution Act, 1930*, to which these three NRTAs are schedules, these arrangements "shall have the force of law notwithstanding anything in the *Constitution Act, 1867*, or any Act amending the same, or any Act of the Parliament of Canada, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid". In other words, provincial game laws in the prairie provinces apply, subject to the specified limits, regardless of any restrictions elsewhere in the Constitution on provincial legislative authority.

The concern emanates from constitutional principles that the courts have held to constrain provincial authority before and apart from section 35 of the *Constitution Act, 1982*. In *Delgamuukw*¹⁷ the Supreme Court held, and in *Paul*¹⁸ it acknowledged, that “the whole range of aboriginal rights that are protected by s. 35(1)” of the *Constitution Act, 1982* come within a core of legislative authority that section 91(24) of the *Constitution Act, 1867* reserves exclusively to the federal order of government.¹⁹ The fact that both decisions also say that justified provincial infringement of Aboriginal rights is constitutionally permissible²⁰ does not contribute to the cause of doctrinal clarity. Supreme Court and other jurisprudence have said the same of the rights conferred or preserved in Crown treaties with Aboriginal peoples.²¹ This clearly means that provincial laws whose purposes or effects²² suggest advertent attempts to extinguish, impair or even relate to any such rights or their exercise are constitutionally invalid: without force or effect. According to traditional constitutional doctrine, it also means that impairment or extinguishment of such rights may not result even inadvertently from the application of valid provincial legislation.²³ When courts conclude that the relevant provincial measure operates inadvertently, through the generality of its language, to impair some core federal matter, they read it down, construing it more narrowly to preclude that inadvertent effect, to preserve its constitutional validity.²⁴ This analysis suggests that the provinces do not

¹⁷ *Supra*, note 4.

¹⁸ *Supra*, note 3.

¹⁹ See *Delgamuukw*, *supra*, note 4, at para. 178 (compare at para. 181); *Paul*, *supra*, note 3, at para. 33.

²⁰ See *supra*, note 4, and accompanying text.

²¹ See *R. v. Morris*, [2006] S.C.J. No. 59, 2006 SCC 59, [2006] 2 S.C.R. 915, at para. 43 (S.C.C.) [hereinafter “*Morris*”]; Deschamps and Abella JJ. (for the majority), at para. 91, McLachlin C.J.C. and Fish J. (dissenting); *R. v. Simon*, [1985] S.C.J. No. 67, [1985] 2 S.C.R. 387, at 411 (S.C.C.) [hereinafter “*Simon*”]; *R. v. Moosehunter*, [1981] S.C.J. No. 27, [1981] 1 S.C.R. 282, at 293 (S.C.C.) (“The Government of Canada can alter the rights of Indians under treaties ... Provinces cannot.”); *R. v. White and Bob*, [1964] B.C.J. No. 212, 50 D.L.R. (2d) 613, at 618 (B.C.C.A.), Davey J.A. (for the plurality), affd on related grounds, [1965] S.C.J. No. 80, [1965] S.C.R. vi, 52 D.L.R. (2d) 491 (S.C.C.).

²² See, e.g., *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] S.C.J. No. 33, 2002 SCC 31, [2002] 2 S.C.R. 146, at paras. 52-54 (S.C.C.) [hereinafter “*Kitkatla*”].

²³ See, e.g., *Delgamuukw*, *supra*, note 4, at para. 181 (“s. 91(24) protects a core of federal jurisdiction even from provincial laws of general application, through the operation of the doctrine of interjurisdictional immunity”) and para. 177 (“s. 91(24) protects a ‘core’ of Indianness from provincial intrusion, through the doctrine of interjurisdictional immunity”); *Paul*, *supra*, note 3, at para. 15.

²⁴ See, e.g., *Derrickson v. Derrickson*, [1986] S.C.J. No. 16, [1986] 1 S.C.R. 285, at 296 (S.C.C.) [hereinafter “*Derrickson*”] (“When otherwise valid provincial legislation, given the

now have, and never have had, any power to impair, let alone to extinguish, the existing treaty or Aboriginal rights of section 91(24) Indians. In 2006, the Supreme Court reached essentially this conclusion in respect of Indian treaty rights.²⁵

In summary, several Supreme Court of Canada decisions have espoused or supported the view that provinces may infringe Aboriginal rights if they can justify the infringement;²⁶ several Supreme Court of Canada decisions — including some of those same decisions²⁷ — have held that Aboriginal and treaty rights lie within a core of exclusive federal legislative authority and that provincial law may not impair or intrude upon such matters, even inadvertently.

I confess that I have not been able to find a satisfactory way of reconciling these parallel but contending streams of Supreme Court jurisprudence. I know of three diverse lines of attempt to reconcile them, but I find none of them convincing.

3. Unsuccessful Attempts at Resolution

Some suggest, first, that all courts need do to resolve this conundrum is recognize a distinction between *infringement* of an existing treaty or

generality of its terms, extends beyond the matter over which the legislature has jurisdiction and over a matter of federal exclusive jurisdiction, it must, in order to preserve its constitutionality, be read down and given the limited meaning which will confine it within the limits of the provincial jurisdiction.”). The Court’s rulings in cases like *Derrickson* are part of a larger body of case law giving effect to the “interjurisdictional immunity” doctrine. The Court’s recent decisions confirm that “impairment” of a “core” federal matter is the appropriate test for invoking the interjurisdictional immunity doctrine to read down, or restrict the application of, valid provincial legislation. See *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 48 (S.C.C.) [hereinafter “*Canadian Western Bank*”]; *Quebec (Attorney General) v. Lacombe*, [2010] S.C.J. No. 38, 2010 SCC 38, [2010] 2 S.C.R. 453, at para. 66 (S.C.C.); *Quebec (Attorney General) v. Canadian Owners and Pilots Assn.*, [2010] S.C.J. No. 39, 2010 SCC 39, [2010] 2 S.C.R. 536, at para. 43 (S.C.C.) [hereinafter “*COPA*”] *per* McLachlin C.J.C.

²⁵ See *Morris*, *supra*, note 21. Strictly speaking, *Morris*, *id.*, did not close the door altogether on provincial capacity to regulate treaty rights (even apart from the special constitutional circumstances that arise from the prairie provinces’ NRTAs: see *supra*, note 16). Missing, for example, from the 1850 treaties that were at issue in *Morris* were provisions, such as one that appears in Treaty No. 8 (see online: <<http://www.ainc-inac.gc.ca/al/hts/tgu/pubs/t8/trty8-eng.asp#chp4>>), subjecting the signatory peoples’ harvesting rights “to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty ...”. In *Badger*, *supra*, note 4, at para. 70, the Supreme Court held that Treaty No. 8, as well as the Alberta NRTA, provided that “provincial game laws would be applicable to Indians so long as they were aimed at conserving the supply of game”. What regulatory or other powers the provinces may derive from treaties themselves require ascertainment case by case, and treaty by treaty.

²⁶ See *supra*, notes 3-11, and accompanying text.

²⁷ See especially *supra*, notes 3, 4, 8, 19-20 and 23, and accompanying text.

Aboriginal right, which triggers the need for justification, and *impairment* of such a right, which triggers, under traditional doctrine, the more absolute protection of interjurisdictional immunity. According to this argument, when infringement of one of these rights falls short of impairment, provincial law may have effect as long as the province can justify the infringement.

My principal concern about this proposed solution is (to paraphrase Kate Monster from *Avenue Q*) that there's a fine, fine line — too fine a line for my juridical comfort — between infringement and impairment of a treaty or Aboriginal right. According to *Morris*,²⁸ the most recent Supreme Court authority on the meaning of “infringement” in relation to section 35 rights, “a *prima facie* infringement requires a ‘meaningful diminution’ of a treaty right. This includes anything but an insignificant interference with that right”.²⁹ According to *COPA*,³⁰ the most recent Supreme Court authority on the meaning of “impairment” in the context of interjurisdictional immunity, impairment “requires a significant or serious intrusion” into the core or exercise of exclusive federal authority.³¹ Is there a reliably discernible distinction between a “meaningful diminution” of a relevant right and a “significant or serious intrusion” upon it? My personal inclination is to doubt that courts have developed the tools with which to define and preserve, in a range of future cases with unpredictable facts, such a subtle distinction.

But even if I am wrong about this, the distinction serves its intended purpose only if “impairment” sets the higher bar of the two: only if, in other words, all impairments are infringements but not all infringements are impairments. If the Supreme Court's decision in *Morris* is any indication, however, it appears that the Court, if anything, considers the opposite to be true. The majority judgment in *Morris*, having acknowledged that provincial laws that interfere with treaty rights to hunt are constitutionally inapplicable to the bearers of such rights, adds this: “[w]here such laws are inapplicable because they impair ‘Indianness’, however, they may nonetheless be found to be applicable by incorporation under s. 88 of the *Indian Act*.”³² This is so, the Court adds, because “[s]ection 88 reflects Parliament's intention to avoid the effects of the

²⁸ *Supra*, note 21.

²⁹ *Morris*, *id.*, at para. 53, citing with approval (at para. 52) an Aboriginal rights case, *R. v. Gladstone*, [1996] S.C.J. No. 79, [1996] 2 S.C.R. 723, at para. 43 (S.C.C.) [hereinafter “*Gladstone*”].

³⁰ *Supra*, note 24.

³¹ *Id.*, at para. 45.

³² *Morris*, *supra*, note 21, at para. 43.

immunity imposed by s. 91(24) by incorporating certain provincial laws of general application into federal law.”³³ But the legal effect of any provincial laws incorporated pursuant to section 88 is “[s]ubject to the terms of any treaty.”³⁴ What triggers the statutory protection that section 88 confers on treaty rights, however, is a *prima facie* infringement of such rights.³⁵ “provincial laws or regulations that place a modest burden on a person exercising a treaty right or that interfere in an insignificant way with the exercise of that right do not infringe the right”.³⁶ (The reasoning of the dissenting judges on these matters is substantially similar.)³⁷

It is important to appreciate what is happening here. The Supreme Court, having already established that the provincial law at issue in *Morris* could not apply as such because it *impaired* the relevant treaty right, prescribed a separate, subsequent inquiry to ascertain whether the provincial law *infringed* that same treaty right. This second inquiry, the one into infringement, serves no useful purpose unless it is at least possible for a provincial law to impair a treaty right without infringing it. If all such impairments were also understood to be infringements, the Court’s subsequent question about infringement would not need asking: it would answer itself.

A second possible way of seeking to reconcile the tension between these two strains of jurisprudence is to suggest that section 35 is itself the source of this new provincial authority to infringe the rights it protects. I have argued at some length elsewhere³⁸ that this suggestion seems unsound, and why: because, in brief, it has no foundation in either the text or the legislative history of the *Constitution Act, 1982* and conflicts with some post-1982 Supreme Court treaty rights jurisprudence. But since then, the Supreme Court, in *Morris*, has expressed itself quite clearly on this point:

Where a *prima facie* infringement of a treaty right is found, a province cannot rely on s. 88 by using the justification test from *Sparrow* and *Badger* in the context of s. 35(1) of the *Constitution Act, 1982*, ... The purpose of the *Sparrow/Badger* analysis is to determine whether an

³³ *Id.*, at para. 44.

³⁴ *Id.*; *Indian Act*, R.S.C. 1985, c. I-5, s. 88.

³⁵ *Morris*, *id.*, at para. 51.

³⁶ *Id.*, at para. 50.

³⁷ See *id.*, at paras. 90-100, *per* McLachlin C.J.C. and Fish J. (dissenting on other grounds).

³⁸ See Kerry Wilkins, “Of Provinces and Section 35 Rights” (1999) 22 Dal. L.J. 185, at 217-19 [hereinafter “Wilkins, ‘Of Provinces’”].

infringement by a government *acting within its constitutionally mandated powers* can be justified. *This justification analysis does not alter the division of powers*, which is dealt with in s. 88. Therefore, while the *Sparrow/Badger* test for infringement may be useful, the framework set out in those cases for determining whether an infringement is justified does not offer any guidance for the question at issue here.³⁹

A final⁴⁰ suggested means of leaving some room for justified provincial infringements of section 35 rights is section 88 of the *Indian Act*. “Section 88,” the Court said in *Morris*, “reflects Parliament’s intention to avoid the effects of the immunity imposed by s. 91(24) by incorporating certain provincial laws of general application into federal law.”⁴¹ Accordingly, this argument runs, some provincial laws that impair section 35 rights can govern such rights nonetheless, provided that the impairment can be justified. I have written at length about this, too,⁴² so I will be quite brief here.

First, section 88 does not, and could not, do anything to increase the provinces’ constitutional capacity. The most it can do is exactly what the Supreme Court has said that it does: adopt into federal law certain specified provincial measures and apply those measures *as* federal law to statutory Indians. Once it is established that such laws cannot apply because they impair section 35 rights, the task of justifying them falls to the federal, not the provincial, order of government. To preserve the validity of those provincial laws in their applications to those who are not statutory Indians, the courts must presume that the provinces intended that these laws be read down so as not to impair the relevant rights. Second, we now know from *Morris* that section 88 itself will screen out any provincial laws whose application would result in infringement of a *treaty* right.⁴³ At most, therefore, section 88 can facilitate infringement

³⁹ *Morris*, *supra*, note 21, at para. 55 (emphasis added).

⁴⁰ To the best of my knowledge.

⁴¹ *Morris*, *supra*, note 21, at para. 44. In fact, we know very little about Parliament’s real intentions in adding what was then s. 87 to the *Indian Act* in 1951: see Kerry Wilkins, “Still Crazy After All These Years: Section 88 of the *Indian Act* at Fifty” (2000) 38 Alta. L. Rev. 458 [hereinafter “Still Crazy”]. But the quotation in the text from *Morris* captures accurately the meaning and function that the courts have ascribed to s. 88. After some considerable early judicial confusion about s. 88’s operation, the Supreme Court provided definitive clarification in *R. v. Dick*, [1985] S.C.J. No. 62, [1985] 2 S.C.R. 309, at 326-28 (S.C.C.) [hereinafter “*Dick*”].

⁴² See Wilkins, “Of Provinces”, *supra*, note 38, at 219-33; Wilkins, *Morris*, *supra*, note 12, at 30-31.

⁴³ *Morris*, *supra*, note 21, at paras. 44-55, *per* Deschamps and Abella JJ. (for the majority); at paras. 95-100, *per* McLachlin C.J.C. and Fish J. (dissenting on other grounds). The majority did leave open the possibility that s. 88 could incorporate by reference provincial laws that infringe

only of Aboriginal rights,⁴⁴ and there have been occasional hints of judicial doubt about even that.⁴⁵ Third, section 88, by its terms, applies exclusively to “Indians” as defined in the *Indian Act*,⁴⁶ not, for example, to Inuit or to most Métis. Fourth, although the issue has not yet been settled definitively, the prevailing view in the lower courts and among the commentators is that the provincial laws that section 88 incorporates apply only to “Indians”, not to or in respect of Indians’ lands.⁴⁷ Fifth, if some infringement of an Aboriginal right does occur as a result of section 88’s intervention, it stands to reason that section 88 itself should be called to account in any justification inquiry about that infringement. But for section 88, the scheme the provincial law created could not have applied in a manner that infringed the right.⁴⁸ Finally, there is good reason to doubt that section 88 could withstand scrutiny in a justification inquiry under section 35 of the *Constitution Act, 1982*, precisely because it takes no account of Aboriginal rights. In this respect, it is a statutory analogue of the kind of “unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications” with which the Supreme Court found such fault in *Adams*.⁴⁹

The problem, therefore, remains unresolved. Justified provincial infringement of Aboriginal rights (at least) has support in Supreme Court

treaty rights that have a commercial aspect (see *id.*, at para. 46), but the rest of its reasoning on the issue leaves little rational basis for such a distinction.

⁴⁴ This is possible because the opening words of s. 88, “Subject to the terms of any treaty”, carve out no comparable explicit exception for Aboriginal rights.

⁴⁵ See, e.g., *Badger*, *supra*, note 4, at para. 69 (“Pursuant to the provisions of s. 88 of the *Indian Act*, provincial laws of general application will apply to Indians. This is so except where they conflict with aboriginal or treaty rights, in which case the latter must prevail”); *Delgamuukw*, *supra*, note 4, at para. 183 (“the explicit reference to treaty rights in s. 88 suggests that the provision was clearly not intended to undermine aboriginal rights”).

⁴⁶ See *Indian Act*, s. 2(1), definition of “Indian”. But note that s. 88 is one of several *Indian Act* provisions that is subject to the extended definition of “Indian” set out in s. 4.1 of that Act.

⁴⁷ For detailed discussion of this issue, see “Still Crazy”, *supra*, note 41, at 483-97. For a notable recent decision taking this position, see *Tsilhqot’in Nation v. British Columbia*, [2007] B.C.J. No. 2465, 2007 BCSC 1700, at para. 1039 (B.C.S.C.), citing Kent McNeil, “Aboriginal Title and Section 88 of the *Indian Act*” (2000) 34 U.B.C. L. Rev. 159; Brian Slattery, “Understanding Aboriginal Rights” (1987) 66 Can. Bar Rev. 727, at 779-81.

⁴⁸ Courts of Appeal in British Columbia (*R. v. Alphonse*, [1993] B.C.J. No. 1402, [1993] 5 W.W.R. 401, at paras. 62-65 (B.C.C.A.); *R. v. Dick*, [1993] B.C.J. No. 1396, [1993] 5 W.W.R. 446, at paras. 17-18 (B.C.C.A.)) and Saskatchewan (*R. v. Sundown*, [1997] S.J. No. 377, [1997] 8 W.W.R. 379, at para. 61 (Sask. C.A.), *affid* without reference to the point, [1999] S.C.J. No. 13, [1999] 1 S.C.R. 393 (S.C.C.)) have held that the justification inquiry in such situations need look only at the infringing provincial measure, not at s. 88, but their reasoning to that conclusion overlooks the fact that there could be no infringement but for s. 88.

⁴⁹ *R. v. Adams*, [1996] S.C.J. No. 87, [1996] 3 S.C.R. 101, at para. 54 (S.C.C.) [hereinafter “*Adams*”].

jurisprudence and has practical advantages, but the task of locating a source within Canadian constitutional law for provincial authority to infringe such rights, even justifiably, is proving to be unusually vexing. And the rule of law requires that provinces not exceed the scope of their constitutional authority.

II. THE ROAD NOT TAKEN AFTER ALL

For a while, it appeared that the Supreme Court of Canada had shown us a pathway out of this predicament. In *Canadian Western Bank*⁵⁰ in 2007, the Court expressed significant displeasure with the constitutional doctrine that gives rise to the problem: interjurisdictional immunity. The Court said:

Canadian federalism is not simply a matter of legalisms. The Constitution, though a legal document, serves as a framework for life and for political action within a federal state, in which the courts have rightly observed the importance of co-operation among government actors to ensure that federalism operates flexibly.⁵¹

Viewed against this background, interjurisdictional immunity appeared inconsistent with the “dominant tide” of contemporary constitutional doctrine,⁵² which urged the Court to “avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest” in “the absence of conflicting enactments of the other level of government”.⁵³ Inappropriate reliance on interjurisdictional immunity, the Court concluded, “would create serious uncertainty”,⁵⁴ risk creating “legal vacuums”, which are, generally speaking, “not desirable”,⁵⁵ and “run ... the risk of creating an unintentional centralizing tendency in constitutional interpretation ... incompatible with the flexibility and co-ordination required by contemporary Canadian federalism”.⁵⁶ The Court added this:

⁵⁰ *Canadian Western Bank*, *supra*, note 24.

⁵¹ *Id.*, at para. 42.

⁵² *Id.*, at paras. 36-37, citing with approval *O.P.S.E.U. v. Ontario (Attorney General)*, [1987] S.C.J. No. 48, [1987] 2 S.C.R. 2, at 17 (S.C.C.), *per* Dickson C.J.C. (concurring).

⁵³ *Canadian Western Bank*, *id.*, at para. 37.

⁵⁴ *Id.*, at para. 43.

⁵⁵ *Id.*, at para. 44.

⁵⁶ *Id.*, at para. 45. See, to generally similar effect, *Canada (Attorney General) v. PHS Community Services Society*, [2001] S.C.J. No. 44, 2011 SCC 44, at paras. 61-65 [hereinafter “PHS”].

Finally, the doctrine would seem as a general rule to be superfluous in that Parliament can always, if it sees fit to do so, make its legislation sufficiently precise to leave those subject to it with no doubt as to the residual or incidental application of provincial legislation. ...⁵⁷

For all these reasons, ... we intend now to make it clear that the Court does not favour an intensive reliance on the doctrine [of interjurisdictional immunity] ...⁵⁸

Although the doctrine is in principle applicable to all federal and provincial heads of legislative authority, the case law demonstrates that its natural area of operation is in relation to those heads of legislative authority that confer on Parliament power over enumerated federal things, people, works or undertakings. ...⁵⁹

In “the absence of prior case law favouring its application to the subject matter at hand”, it became permissible, generally speaking, just to skip the question of interjurisdictional immunity in division of powers analysis.⁶⁰

In the result, the appellant bank was unsuccessful in resisting the application of Alberta law to its business of promoting to its customers certain kinds of insurance.

Although the Supreme Court was careful to go no farther than to say that “interjurisdictional immunity is of limited application and should in general be reserved for situations already covered by precedent”⁶¹ and to acknowledge that “its existence is supported both textually and by the principles of federalism”,⁶² it was terribly tempting to suppose that *Canadian Western Bank* was the beginning of the end for interjurisdictional immunity and that the courts would soon find a way of removing that inconvenient impediment altogether from provincial legislative authority. Shorn of that obstacle, valid provincial legislation could countenance infringement of Aboriginal (*and*, most probably, treaty) rights, as long as the province could justify the infringement: just as the Supreme Court keeps saying it can.⁶³ The Court’s constitutional pronouncements on provincial authority seemed to be converging.

⁵⁷ *Canadian Western Bank, id.*, at para. 46.

⁵⁸ *Id.*, at para. 47.

⁵⁹ *Id.*, at para. 67. Compare *id.*, at para. 41.

⁶⁰ *Id.*, at para. 78.

⁶¹ *Id.*, at para. 77.

⁶² *Id.*, at para. 33.

⁶³ See *supra*, notes 3-11, and accompanying text.

To some of us, this seemed like wishful thinking even then.⁶⁴ For one thing, the Court had said expressly in *Canadian Western Bank* that “Aboriginal lands” were among the “things”, and “Aboriginal peoples” among the “persons”, that had come within the traditionally recognized purview of interjurisdictional immunity.⁶⁵ By way of confirmation, it added, in its discussion of “The Indian Cases”,⁶⁶ that “in their federal aspect (‘Indianness’), Indian people are governed by federal law exclusively ...”⁶⁷ And the *Morris*⁶⁸ and *Canadian Western Bank* appeals were under reserve together at the Supreme Court for several months.⁶⁹ It is all but inconceivable that the Court decided either of these appeals without knowing what it was going to say in the other. If the Court’s intention in *Canadian Western Bank* had been to overrule, or even to undercut the authority, of a decision it had released just five months earlier, one would have expected it to say so very clearly.⁷⁰

But worse news, for those who predicted the obsolescence of the interjurisdictional immunity doctrine, came in the *COPA* decision⁷¹ in the fall of 2010. In *COPA*, the Supreme Court held valid Quebec agricultural zoning laws to be constitutionally incapable of restricting the placement of aerodromes in that province, not because these laws conflicted with federal aeronautics law — the Court said they did not⁷² — but because they impaired core federal capacity to determine the locations of aerodromes. In reaching that conclusion, the Court, without overruling

⁶⁴ See, e.g., Wilkins, “*Morris*”, *supra*, note 12, at 18-23.

⁶⁵ *Canadian Western Bank*, *supra*, note 24, at para. 41. Compare *PHS*, *supra*, note 56, at para. 60.

⁶⁶ *Canadian Western Bank*, *id.*, at paras. 60-61.

⁶⁷ *Id.*, at para. 61.

⁶⁸ *Supra*, note 21.

⁶⁹ The Supreme Court heard the *Morris* appeal, *id.*, on October 14, 2005 and released its decision on December 21, 2006; it heard *Canadian Western Bank*, *supra*, note 24, on April 11, 2006 and released its decision on May 31, 2007.

⁷⁰ On the subject of overruling previous Supreme Court of Canada precedent, see most recently *Ontario (Attorney General) v. Fraser*, [2011] S.C.J. No. 20, 2011 SCC 20 (S.C.C.). According to Rothstein J., dissenting but not on this point:

in order to overrule its own precedent, the Court must be satisfied, based upon substantial reasons, that the precedent was wrongly decided. It is not appropriate simply because of a change in the composition of the Court that precedent should be overturned, because of the views of newly appointed judges. There must be compelling reasons to justify overruling ...

Id., at para. 130. The majority agreed (*id.*, at paras. 56-57) and added (at para. 59) that the Court should not overrule a precedent it has not been asked to overrule: “[a]bsent notice to the profession and interested persons, overruling ... seems to us procedurally inappropriate.” It appears to follow necessarily that Supreme Court of Canada decisions cannot be overruled by implication.

⁷¹ *Supra*, note 24.

⁷² *COPA*, *id.*, at paras. 62-74.

Canadian Western Bank, managed to cast considerable doubt upon the critique of interjurisdictional immunity set out in that earlier decision.

As mentioned above,⁷³ the majority in *Canadian Western Bank* had expressed an intention from then on to confine the application of interjurisdictional immunity to “its natural area of operation” as delineated by prior case law: “those heads of legislative authority that confer on Parliament power over enumerated federal things, people, works or undertakings”.⁷⁴ But the federal head of power at issue in *COPA* — the power to make laws in relation to aeronautics — does not appear, or derive from anything that appears, in the list of enumerated heads of federal legislative authority; it derives instead, by inference, from the residual federal power over peace, order and good government.⁷⁵ Who knew that federal authority over “the Peace, Order, and Good Government of Canada” — that which remains to the federal order after subtraction of all the classes of subjects assigned exclusively to the provinces⁷⁶ — had a core of its own that is capable of resisting incidental impairment under the provincial heads of power subtracted from it? Second, it is far from clear that power over “aeronautics”, enumerated or not, qualifies as a head of “power over ... federal things, people, works or undertakings”. Aeronautics is not a person or a class of persons, and it is hardly a thing or class of things. One could, perhaps, classify it as a “work” or an “undertaking” if one were willing to use those terms loosely, but used so loosely, these terms could encompass almost any activity, including the business of banking: the federally regulated activity held not to attract interjurisdictional immunity in *Canadian Western Bank*. As for precedent, it is true that the Court had held, as early as *Johannesson*,⁷⁷ that aeronautics regulation is now a matter exclusively for federal regulation because of its national dimensions; it held there, as well, that matters

⁷³ See *supra*, notes 58-60, and accompanying text.

⁷⁴ *Canadian Western Bank*, *supra*, note 24, at para. 67.

⁷⁵ “Because commercial aviation was not foreseen in 1867, aviation is not articulated as a head of power under s. 91 of the *Constitution Act, 1867*. However, it has been held to be a matter of national importance and hence supported under the federal [Peace, Order and Good Government] power”: *COPA*, *supra*, note 24, at para. 28.

⁷⁶ The opening words of s. 91 of the *Constitution Act, 1867* — the provision conferring legislative authority on the federal order in Canada — read, in relevant part, as follows:

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and Good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the legislatures of the Provinces ...

⁷⁷ *Johannesson v. West Saint Paul (Rural Municipality)*, [1951] S.C.J. No. 50, [1952] 1 S.C.R. 292 (S.C.C.) [hereinafter “*Johannesson*”].

relating to the placement of aerodromes and airports are essential to the exercise of that authority. Never before, however, had the Supreme Court protected aeronautical matters from incidental impairment resulting from valid provincial law. In *Johannesson*, for instance, the Court had held that the miscreant provincial law was altogether invalid, not that it was valid but constitutionally inapplicable. If aeronautics lies within the envelope said by precedent to attract the doctrine of interjurisdictional immunity, it pushes firmly outward against the outer margins of that envelope. This is not what one would expect from a court determined to constrain, let alone to attrit, the reach of that immunity.

There is more. One finds in *COPA* no mention of, nor concern about, what *Canadian Western Bank* had described as the “dominant tide” of contemporary constitutional interpretation:⁷⁸ a strong preference to leave undisturbed, in the absence of proof of conflict between them, the operation of laws enacted by both traditional orders of government, in the interest of promoting flexible, cooperative federalism.⁷⁹ If promotion of a flexible, cooperative federalism were indeed the principal theme of division of powers jurisprudence, one would have expected to see it displayed particularly in a case such as *COPA*, which features legislation from Quebec.⁸⁰ Nowhere in Confederation is there greater attentiveness to provincial legislative autonomy. There was, again, no conflict between the permissive federal regime that dealt with placement of aerodromes and the impugned provincial law, which required approval from a provincial commission for any change in the use of designated agricultural lands.⁸¹ The reason, the Court said, why the provincial scheme could not be allowed to constrain the placement of aerodromes on the relevant lands was that, if it did:

it would force the federal Parliament to choose between accepting that the province can forbid the placement of aerodromes on the one hand, or specifically legislating to override the provincial law on the other hand. This would seriously impair the federal power over aviation, effectively forcing the federal Parliament to adopt a different and more

⁷⁸ See *supra*, notes 52-53, and accompanying text.

⁷⁹ See *Canadian Western Bank*, *supra*, note 24, at paras. 36-37, 42-43, 45.

⁸⁰ It is interesting that the Court's two francophone judges from Quebec, LeBel and Deschamps JJ., were in dissent in *COPA*.

⁸¹ *COPA*, *supra*, note 24, at paras. 62-74.

burdensome scheme for establishing aerodromes than it has in fact chosen to do.⁸²

Put differently, the provincial law cannot apply because its application interferes with Parliament's freedom to legislate, if it chooses, permissively,⁸³ or, by implication, to leave the relevant core federal matter altogether unregulated.⁸⁴ Missing altogether from the reasoning in *COPA* are the concerns, expressed so forcefully in *Canadian Western Bank*,⁸⁵ about the risk of (potentially undesirable) legal vacuums and the risk of unintentional centralization of power that were said to attend the operation of interjurisdictional immunity.⁸⁶ Missing too is the supposition from *Canadian Western Bank* that the doctrine of interjurisdictional immunity "would seem as a general rule to be superfluous", because Parliament may always achieve its ends by legislating expressly to oust the inconvenient provincial regime.⁸⁷

Finally, the *COPA* majority expressly preserves a place in Canadian constitutional jurisprudence for interjurisdictional immunity.⁸⁸

⁸² *Id.*, at para. 60. Compare *id.*, at para. 48: "Instead of the current permissive regime, Parliament would be obliged to legislate for the specific location of particular aerodromes. Such a substantial restriction of Parliament's legislative freedom constitutes an impairment of the federal power."

⁸³ "Parliament would not be free to introduce broad, permissive legislation, should it so choose (and as it has chosen to do) ... [T]his ... would narrow Parliament's legislative options and impede the exercise of its core jurisdiction": *id.*, at para. 53.

⁸⁴ "In those circumstances where interjurisdictional immunity applies, the doctrine asks whether the core of the legislative power has been impaired, not whether or how Parliament has, in fact, chosen to exercise that power": *id.*, at para. 52.

⁸⁵ *Supra*, note 24.

⁸⁶ See *supra*, notes 55-56, and accompanying text. For a similar view, see Bruce Ryder, "Equal Autonomy in Canadian Federalism: The Continuing Search for Balance in the Interpretation of the Division of Powers" in J. Cameron & B. Ryder, eds. (2011), 54 S.C.L.R. at 565, at 590:

Treating a narrowing of Parliament's legislative options as sufficient to amount to an impairment of the exercise of its core jurisdiction, thus requiring the reading down of a valid provincial law, turns the reasoning in *Canadian Western Bank* on its head. One of the reasons Binnie and LeBel JJ. gave [in *Canadian Western Bank*] for restricting the interjurisdictional immunity doctrine is that it risks creating undesirable legal vacuums. In *COPA* and *Lacombe*, the Chief Justice stated that avoiding legal vacuums by permitting valid provincial laws to apply to core federal subject matters is problematic because it forces Parliament to legislate if it wishes to overcome or supplement the rules set out in provincial law. In other words, the Chief Justice would rather risk legal vacuums than risk interference with Parliament's legislative agenda [footnote omitted].

⁸⁷ See *supra*, note 57 and accompanying text. Come to that, the Governor General still has the constitutional authority, within one year of receiving notice of Royal Assent to a provincial statute, to annul it altogether by disallowance: see *Constitution Act, 1867*, ss. 56, 90. But no one, to my knowledge, has ever suggested that this is the only power the Constitution requires to deal with provincial laws that are deemed inappropriate.

⁸⁸ See *COPA*, *supra*, note 24, at para. 58, where the Court dispatches impatiently an argument that, in its view "is, at bottom, a challenge to the very existence of the doctrine of interjurisdictional

If the *COPA* decision is any guide, therefore, anticipations of the death of interjurisdictional immunity have been, for better or worse, exaggerated. What was said to be the “dominant tide” of constitutional interpretation⁸⁹ appears to have ebbed and to have left intact (ashore, as it were) the paradox with which we began about provincial authority and section 35 rights. The Court has said that the provinces may infringe Aboriginal rights, but its rulings on interjurisdictional immunity have complicated considerably the task of accounting, in a doctrinally respectable way, for the source of that authority.

III. SIGNS OF DISCOMFORT: *NIL/TU,O* AND *NATIVE CHILD*

The Supreme Court had two other opportunities during 2010 to consider the relationship between valid provincial legislation and life in Aboriginal communities. Neither dealt with claims of treaty or Aboriginal right, but both concerned the limits on provincial authority in regard to matters of considerable significance to those classified for constitutional purposes as Indians.

*NIL/TU,O*⁹⁰ and *Native Child*⁹¹ were quite similar cases from British Columbia and Ontario, respectively. The Court heard and decided them together. At issue in both was which order of government, the federal or the provincial, had legislative authority to regulate the labour relations of provincially-incorporated child and family services societies, staffed predominantly by Aboriginal people and partially funded by the federal government. Both delivered, with provincial authority and under provincial supervision, specified child protection services primarily, if not exclusively, to Aboriginal families: *NIL/TU,O* on reserve; *Native Child* and Family Services off reserve, in downtown Toronto. The Court in both cases concluded unanimously that the labour relations of the two entities lay within provincial legislative authority, but divided 6-3 on the reasoning to that conclusion. *NIL/TU,O* is the principal case — *Native Child*

immunity. Among the reasons for rejecting a challenge to the existence of the doctrine,” the court explains, “is that the text of the *Constitution Act, 1867*, itself refers to exclusivity.... The doctrine of interjurisdictional immunity has been criticized but has not been removed from the federalism analysis.”

⁸⁹ See *supra*, notes 52-53, and accompanying text.

⁹⁰ *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, [2010] S.C.J. No. 45, 2010 SCC 45, [2010] 2 S.C.R. 696 (S.C.C.) [hereinafter “*NIL/TU,O*”].

⁹¹ *Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto*, [2010] S.C.J. No. 46, 2010 SCC 46, [2010] 2 S.C.R. 737 (S.C.C.) [hereinafter “*Native Child*”].

did little more than apply its reasoning — so it is the one that requires the closer attention.

Perhaps the easiest way of understanding the difference between the two approaches to the same result in *NIL/TU,O* is by reference to the following passage from Beetz J.'s majority judgment in *Four B* from 1980:

In my view the established principles relevant to this issue can be summarized very briefly. With respect to labour relations, exclusive provincial legislative competence is the rule, exclusive federal competence is the exception. The exception comprises, in the main, labour relations in undertakings, services and businesses which, having regard to the functional test of the nature of their operations and their normal activities, can be characterized as federal undertakings, services or businesses: ... [citing authority].

There is nothing about the business or operation of Four B which might allow it to be considered as a federal business: the sewing of uppers on sport shoes is an ordinary industrial activity which clearly comes under provincial legislative authority for the purposes of labour relations. Neither the ownership of the business by Indian shareholders, nor the employment by that business of a majority of Indian employees, nor the carrying on of that business on an Indian reserve under a federal permit, nor the federal loan and subsidies, taken separately or together, can have any effect on the operational nature of that business. By the traditional and functional test, therefore, *The Labour Relations Act* applies to the facts of this case, and the Board has jurisdiction.

... It is argued that the functional test is inappropriate and ought to be disregarded where legislative competence is conferred not in terms relating to physical objects, things or systems, but to persons or groups of persons such as Indians or aliens.

I cannot agree with these submissions.

The functional test is a particular method of applying a more general rule namely, that exclusive federal jurisdiction over labour relations arises only if it can be shown that such jurisdiction forms an integral part of primary federal jurisdiction over some other federal object: the *Stevedoring* case.

Given this general rule, and assuming for the sake of argument that the functional test is not conclusive for the purposes of this case, the first question which must be answered in order to deal with appellant's submissions is whether the power to regulate the labour relations in issue forms an integral part of primary federal jurisdiction over Indians

and Lands reserved for the Indians. The second question is whether Parliament has occupied the field by the provisions of the *Canada Labour Code*.

In my opinion, both questions must be answered in the negative.⁹²

Both judgments in *NIL/TU,O* agree that the “operations and ... normal activities”⁹³ of the relevant employment enterprise are what needs attention in the division of powers analysis.⁹⁴ The disagreement between them is about the relevance to this analysis, as it ought to apply to the operations of *NIL/TU,O* or to those of *Native Child*, of what lies at the core of exclusive federal authority over “Indians” pursuant to section 91(24) of the *Constitution Act, 1867*.

The approach of the majority focuses on two portions of the *Four B* passage just quoted. The first is from the initial cited paragraph:

The exception [to the general rule that matters relating to labour relations lie within exclusive federal legislative authority] comprises, in the main, labour relations in undertakings, services and businesses which, having regard to the functional test of the nature of their operations and their normal activities, can be characterized as federal undertakings, services or businesses: ...⁹⁵

The second is this clause, which appears in the next-to-last quoted paragraph: “and assuming for the sake of argument that the functional test is not conclusive for the purposes of this case”.⁹⁶ From these materials, the majority concludes that the “functional test” for use in assigning labour relations jurisdiction is nothing more than the inquiry into whether the “operations and ... normal activities” of the relevant enterprise “can be characterized as federal undertakings, services or businesses”. It is only if the results of the functional test, so understood, are inconclusive that one need go on to consider whether provincial regulation of the labour relations of the relevant employment enterprise would impair the core of a federal head of power such as section 91(24).⁹⁷ “At no point,” the majority says:

⁹² *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] S.C.J. No. 138, [1980] 1 S.C.R. 1031, at 1045-47 (S.C.C.) [hereinafter “*Four B*”].

⁹³ *Id.*, at 1045.

⁹⁴ See *NIL/TU,O*, *supra*, note 90, at paras. 14-15, *per* Abella J. (for the majority), at para. 54, *per* McLachlin C.J.C. and Fish J. (concurring in the result).

⁹⁵ *Four B*, *supra*, note 92, at 1045.

⁹⁶ *Id.*, at 1047.

⁹⁷ See *NIL/TU,O*, *supra*, note 90, at paras. 3, 4 (“The ‘core’ of whatever federal head of power happens to be at issue in a particular labour relations case has never been used by this Court

in discussing the functional test [in *Four B*], does Beetz J. mention the “core” of s. 91(24) or its content. In fact, he makes it clear that only if the functional test is inconclusive as to whether a particular undertaking is “federal”, should a court consider whether provincial regulation of labour relations would impair the “core” of whatever federal regulation governed the entity.⁹⁸

The concurring judges focus instead on this passage from the third to last paragraph of the text quoted from *Four B*:

The functional test is a particular method of applying a more general rule namely, that exclusive federal jurisdiction over labour relations arises only if it can be shown that such jurisdiction forms an integral part of primary federal jurisdiction over some other federal object ...⁹⁹

This proposition, they argue, establishes that the purpose of the functional test is just to ascertain whether provincial regulation of the relevant employment enterprise would impair the core of any exclusively federal classes of subjects.¹⁰⁰ Although they acknowledge that “Beetz J.’s reasons in another passage^[101] suggest that the functional test might be a preliminary step to determining whether the activity forms an integral part of primary federal jurisdiction,” they point out, correctly,¹⁰² that “[i]n application, ... Beetz J. went directly to a discussion of the scope of the ‘core of Indianness’ and whether the activity at issue fell within that core. He concluded that it did not.”¹⁰³

It is difficult to argue that either of these competing approaches, understood solely as an interpretation of this Delphic passage from *Four B*, is unreasonable or demonstrably preferable to the other. If asked, though, I would have said that the approach the concurring judges prescribed was

to determine whether an entity is a ‘federal undertaking’ for the purposes of triggering the jurisdiction of the *Canada Labour Code*”) and paras. 12-20, *per* Abella J. (for the majority).

⁹⁸ *Id.*, at para. 16.

⁹⁹ *Four B*, *supra*, note 92, at 1047.

¹⁰⁰ See *NIL/TU, O*, *supra*, note 90, at para. 58 (“Reading [the relevant earlier S.C.C. decisions on the issue] together, we see no reason to depart from the view that the central question is whether the operation, viewed functionally in terms of its normal and habitual activities, falls within the core of a federal head of power, in this case s. 91(24) of the *Constitution Act, 1867*”), at para. 60 (“The proper approach is simply to ask, as the cases consistently have, whether the Indian operation at issue, viewed functionally in terms of its normal and habitual activities, falls within the core of s. 91(24) of the *Constitution Act, 1867*”), and at para. 61 (“The functional analysis of the operation’s activities is not a preliminary step; rather it provides the answer to whether the activity falls within the protected core”), McLachlin C.J.C. and Fish J. (concurring in the result).

¹⁰¹ The passage quoted *supra*, note 96.

¹⁰² See *Four B*, *supra*, note 92, at 1047-49.

¹⁰³ *NIL/TU, O*, *supra*, note 90, at para. 57, *per* McLachlin C.J.C. and Fish J. (concurring in the result).

better, sounder constitutional law. I hold this view for two reasons. First and more important, it seems to me inconsistent with constitutional principle (especially in the wake of *COPA*¹⁰⁴) for provincial labour relations regulation to be able to apply in a given situation despite impairing the core of one or more heads of exclusive federal authority.¹⁰⁵ And the only way of ensuring, in a case where the question arises, that provincial labour relations law does not impair the core of federal authority over something is to ask that question and answer it. Second, even if this were not the case, there is no obvious reason why constitutional analysis of provincial labour relations laws should operate differently from constitutional analysis of other valid provincial legislation.

But the most important practical difference for present purposes between the two approaches is this: the approach of the concurring judges required them to try to articulate the core of the “Indians” power in section 91(24);¹⁰⁶ the approach of the majority did not.¹⁰⁷ What we find in *NIL/TU,O*, therefore, is a proposal, offered by the three most senior judges of the Supreme Court of Canada,¹⁰⁸ for further consideration when prescribing what is at the core of this head of power. Here it is:

We may therefore conclude that the core, or “basic, minimum and unassailable content” of the federal power over “Indians” in s. 91(24) is defined as matters that go to the status and rights of Indians. Where their status and rights are concerned, Indians are federal “persons”, regulated by federal law: see *Canadian Western Bank*, at para. 60.

It follows that a provincial law of general application will extend to Indian undertakings, businesses or enterprises, whether on or off a reserve, *ex proprio vigore* and by virtue of s. 88 of the *Indian Act*, R.S.C. 1985, c. I-5, *except* when the law impairs those functions of the enterprise which are intimately bound up with the status and rights of Indians. The cases illustrate matters that may go to the status and rights of Indians. These include, *inter alia*:

¹⁰⁴ *Supra*, note 24.

¹⁰⁵ Compare *NIL/TU,O*, *supra*, note 90, at para. 60, *per* McLachlin C.J.C. and Fish J.: To exclude consideration of s. 91(24) would negate the federal power. Conversely, to deem any Aboriginal aspect sufficient to trigger federal jurisdiction would threaten to swallow the presumption that labour relations fall under provincial jurisdiction.

¹⁰⁶ “In these circumstances ... the first step is to determine the extent of the core federal undertaking or power”: *id.*, at para. 61, *per* McLachlin C.J.C. and Fish J. (concurring in the result).

¹⁰⁷ “Since in my view the functional test conclusively establishes that *NIL/TU,O* is a provincial undertaking, I do not see this case as being the first to require an examination of the ‘core’ of s. 91(24)”: *id.*, at para. 4, *per* Abella J. (for the majority).

¹⁰⁸ McLachlin C.J.C., Binnie and Fish JJ.

- Indian status: *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751, *per* Laskin C.J., writing for himself and three other Justices, at pp. 760-61, and *per* Beetz J., writing for himself and Pigeon J., at p. 787;
- The “relationships within Indian families and reserve communities”: *Canadian Western Bank*, at para. 61;
- “[R]ights so closely connected with Indian status that they should be regarded as necessary incidents of status such for instance as registrability, membership in a band, the right to participate in the election of Chiefs and Band Councils, reserve privileges, etc.”: *Four B*, at p. 1048;
- The disposition of the matrimonial home on a reserve: *Paul v. Paul*, [1986] 1 S.C.R. 306;
- The right to possession of lands on a reserve and, therefore, the division of family property on reserve lands: *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285, at p. 296;
- Sustenance hunting pursuant to Aboriginal and treaty rights, such as the killing of deer for food: *Dick*;
- The right to advance a claim for the existence or extent of Aboriginal rights or title in respect of a contested resource or lands: *Delgamuukw and Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146; and
- The operation of constitutional and federal rules respecting Aboriginal rights: *Paul v. British Columbia*, among others.

These examples make it clear that the focus of the analysis rests squarely on whether the nature of the operation and its normal activities, as distinguished from the people who are involved in running it or the cultural identity of those who may be affected by it, relate to what makes Indians federal persons as defined by what they do and what they are: *Dick*; *Delgamuukw*.¹⁰⁹

With respect, one can be grateful that paragraph 71 of *NIL/TU,O* did not command the support of a majority of the Court. If it had, it would have generated substantial doctrinal confusion. For several reasons, it would be imprudent to use it as trustworthy guidance to the core of section 91(24).

¹⁰⁹ *NIL/TU,O*, *supra*, note 90, at paras. 70-72 (emphasis in original). See *id.*, at para. 66 for an earlier intimation that Indian “status and rights” are what comprise the core of s. 91(24).

Consider first the opening sentence:

It follows that a provincial law of general application will extend to Indian undertakings, businesses or enterprises, whether on or off a reserve, *ex proprio vigore* and by virtue of s. 88 of the *Indian Act*, R.S.C. 1985, c. I-5, *except* when the law impairs those functions of the enterprise which are intimately bound up with the status and rights of Indians.¹¹⁰

If *Four B* were one's only frame of reference for the relevant law,¹¹¹ one might be excused for saying such a thing. But we have known since *Dick*¹¹² that no provincial legislation applies to Indians both *ex proprio vigore* and pursuant to section 88; these categories operate in the alternative to one another.¹¹³ Section 88, in fact, comes into play precisely when, and only when, a candidate provincial law "impairs those functions of the enterprise which are intimately bound up with the status and rights of Indians".¹¹⁴ Supreme Court decisions have reconfirmed these conclusions repeatedly in the interim.¹¹⁵ This sentence errs, therefore, in two respects: in supposing that section 88 operates on provincial laws that apply to Indians of their own force, and in supposing that it does not operate on provincial laws whose application would impair the core of Indianness.

¹¹⁰ *Id.*, at para. 71 (emphasis in original).

¹¹¹ See *Four B*, *supra*, note 92, at 1049:

[W]hereas the Indian Act, R.S.C. 1970, c. I-6, regulates certain Indian civil rights such as the right to make a will and the distribution of property on intestacy, it does not provide for the regulation of the labour relations of Indians with one another or with non-Indians. ... These labour relations accordingly remain subject to laws of general application in force in the Province as is contemplated by s. 88 of the *Indian Act*.

¹¹² *Supra*, note 41.

¹¹³ See *id.*, at 326-27:

I believe that a distinction should be drawn between two categories of provincial laws. There are, on the one hand, provincial laws which can be applied to Indians without touching their Indianness ... ; there are on the other hand, provincial laws which cannot apply to Indians without regulating them *qua* Indians.

Laws of the first category, in my opinion, continue to apply to Indians *ex proprio vigore* as they always did before the enactment of s. 88 in 1951 ... and quite apart from s. 88. ...

I have come to the view that it is to the laws of the second category that s. 88 refers.

¹¹⁴ See, *supra*, note 110, and accompanying text.

¹¹⁵ See, e.g., *Derrickson*, *supra*, note 24, at 296-97; *R. v. Francis*, [1988] S.C.J. No. 43, [1988] 1 S.C.R. 1025, at 1028-29, 1030-31 (S.C.C.); *Côté*, *supra*, note 3, at para. 86; *Delgamuukw*, *supra*, note 4, at para. 182. But see *R. v. Horseman*, [1990] S.C.J. No. 39, [1990] 1 S.C.R. 901, at 936 (S.C.C.) *per* Cory J. (for the majority), where the Court appeared to have overlooked the decision in *Dick*, *supra*, note 41, and the intervening jurisprudence.

Consider next the second bulleted candidate the concurring judges propose for inclusion in the core of section 91(24): “[t]he ‘relationships within Indian families and reserve communities: *Canadian Western Bank*, at para. 61.’”¹¹⁶ This is correct as far as it goes; *Canadian Western Bank* says this:

Thus, in *Natural Parents*,^[117] Laskin C.J. held the provincial *Adoption Act* to be inapplicable to Indian children on a reserve because to compel the surrender of Indian children to non-Indian parents “would be to touch ‘Indianness’, to strike at a relationship integral to a matter outside of provincial competence” (pp. 760-61).¹¹⁸

This proposition poses no problem in its application to the facts of *NIL/TU,O*; *NIL/TU,O*, the society, possessed no powers of child protection at the time of the events that led to that litigation.¹¹⁹ But the powers of the children’s aid society at issue in *Native Child*¹²⁰ did include “investigating allegations or evidence that children who are under the age of sixteen years ... may be in need of protection; protecting [those children,] where necessary”; and “placing children for adoption”.¹²¹ On the different facts of *Native Child*, one might in these circumstances have expected at least some comment from the concurring judges on the exercise of this provincial authority.¹²²

The third bullet, a direct lift from *Four B*, gives no cause for doctrinal concern. The fourth and fifth, which deal with rights that pertain to reserve lands, are suitable examples of core federal matters, but including them in a list of core federal powers in relation to “Indians” overlooks the reminder, also from *Four B*, that “Section 91.24 of the [*Constitution Act, 1867*] assigns jurisdiction to Parliament over two distinct subject matters, Indians *and* Lands reserved for the Indians, not Indians *on*

¹¹⁶ *NIL/TU,O*, *supra*, note 90, at para. 71, *per* McLachlin C.J.C. and Fish J. (concurring in the result).

¹¹⁷ *Natural Parents v. Superintendent of Child Welfare*, [1975] S.C.J. No. 101, [1976] 2 S.C.R. 751 (S.C.C.) [hereinafter “*Natural Parents*”].

¹¹⁸ *Canadian Western Bank*, *supra*, note 24, at para. 61.

¹¹⁹ See *NIL/TU,O*, *supra*, note 90, especially at paras. 29-30, *per* Abella J. (for the majority).

¹²⁰ *Supra*, note 91.

¹²¹ *Id.*, at para. 7, *per* Abella J. (for the majority).

¹²² Instead, they said only that they concurred with the majority, but “on the basis of the approach outlined in our reasons in *NIL/TU,O*”: *id.*, at para. 13. Consider here the merits of this observation from the *NIL/TU,O* majority: “the question is not whether the entity’s *operations* lie at the ‘core’ of the federal head of power; it is whether the provincial regulation of that entity’s *labour relations* would impair the ‘core’ of that head of power”: *NIL/TU,O*, *supra*, note 90, at para. 20, *per* Abella J. (emphasis in original).

Lands reserved for the Indians.”¹²³ These propositions relate more properly to the core of the “Lands reserved” power.

It is the last three items in the concurring judges’ list from *NIL/TU,O* that create the greatest potential for further constitutional confusion, both for what they say and for what they do not say. It is true, for example, that “Sustenance hunting pursuant to Aboriginal and treaty rights, such as the killing of deer for food”¹²⁴ has been placed at the core of federal authority over “Indians”,¹²⁵ but the *Dick* decision¹²⁶ does nothing to substantiate the point. It is not a treaty case;¹²⁷ it involves no assertion of Aboriginal rights;¹²⁸ and the court expressly did not decide, but assumed without deciding, that the relevant provincial law could not apply as such to the hunting activity for which Mr. Dick was accused.¹²⁹ (And why did the court make no mention of *Morris*?)¹³⁰ It is also true, however, that this proposition understates, without explanation, the role of treaty and Aboriginal rights in the core of exclusive federal authority under section 91(24). Earlier Supreme Court of Canada jurisprudence had held, as mentioned above, that the core of the “Indians” power houses both Aboriginal and treaty rights *per se*, not just those that pertain to sustenance hunting.¹³¹

As for “[t]he right to advance a claim for the existence or extent of Aboriginal rights or title in respect of a contested resource or lands,”¹³² one would have expected, other things equal, such a right to lie within the range of provincial authority over “Procedure in Civil Matters” in the courts of a province.¹³³ We know from *Paul*¹³⁴ that the provinces have full constitutional capacity to authorize their administrative tribunals to

¹²³ *Four B*, *supra*, note 92, at 1049-50 (emphasis in original). Compare *Delgamuukw*, *supra*, note 4, at para. 178 (Aboriginal “rights in relation to land ... derive from s. 91(24)’s reference to ‘Lands reserved for the Indians’”); and generally, *id.*, at paras. 174-178 (dealing separately with federal legislative authority over “Lands reserved for the Indians” and over “Indians”).

¹²⁴ *NIL/TU,O*, *supra*, note 90, at para. 71, quoted in text, *supra*, at note 109.

¹²⁵ See, as regards subsistence treaty rights to hunt, *Morris*, *supra*, note 21, at para. 43, *per* Deschamps and Abella JJ. (for the majority), and at paras. 91, 100, *per* McLachlin C.J.C. and Fish J. (dissenting on other grounds).

¹²⁶ *Supra*, note 41.

¹²⁷ *Id.*, at 312 (appellant “is a non-treaty Indian”), citing *R. v. Dick*, [1982] B.C.J. No. 2191, 3 C.C.C. (3d) 481, at 484 (B.C.C.A.), *per* Lambert J.A. (dissenting on other grounds).

¹²⁸ See *R. v. Dick*, *id.*, at 315 (“One issue that does not arise is that of Aboriginal Title or Rights”).

¹²⁹ See *id.*, at 320-21.

¹³⁰ *Supra*, note 21.

¹³¹ See *supra*, notes 17-21 and accompanying text.

¹³² *NIL/TU,O*, *supra*, note 90, at para. 71, quoted in text *supra*, at note 109.

¹³³ *Constitution Act, 1867*, s. 92(14).

¹³⁴ *Supra*, note 3.

hear and determine claims of Aboriginal right brought before them in otherwise proper proceedings¹³⁵ and to deprive their tribunals of that jurisdiction, either explicitly or by withholding from them power to decide questions of law. (Provincially constituted courts appear to stand in the same position.) This acknowledged provincial constitutional authority seems indistinguishable from authority over “[t]he right to advance a claim for the existence or extent of Aboriginal rights or title.”¹³⁶ And neither *Delgamuukw*¹³⁷ nor *Kitkatla*,¹³⁸ the two decisions on which the concurring judges in *NIL/TU,O* rely for this proposition, speaks thematically to the issue. In *Kitkatla*, no such question arose: the appellant First Nation had abandoned any claim of Aboriginal right or title by the time the case reached the Court.¹³⁹ *Delgamuukw* did conclude that the appellants’ claims of Aboriginal rights and title were not properly before the Court,¹⁴⁰ but it did so because of defects in the pleadings not corrected by formal amendment. There was no suggestion that British Columbia lacked authority to regulate the procedure for Aboriginal rights or title claims prosecution through the courts.

Finally, the concurring judges say that “[t]he operation of constitutional and federal rules respecting Aboriginal rights” lies within the core of exclusive federal authority over “Indians”. The reference here to “federal rules respecting Aboriginal rights”, once properly understood,¹⁴¹

¹³⁵ See *id.*, at paras. 21-23, 34.

¹³⁶ See *id.*, at para. 21; *Ontario (Attorney General) v. Pembina Exploration Canada Ltd.*, [1989] S.C.J. No. 9, [1989] 1 S.C.R. 206 (S.C.C.).

¹³⁷ *Supra*, note 4.

¹³⁸ *Supra*, note 22.

¹³⁹ *Id.*, at para. 47.

¹⁴⁰ *Delgamuukw*, *supra*, note 4, at paras. 73-77.

¹⁴¹ In the absence of some relevant context or history, there would be good reason to doubt that all federal rules about something federal — about Aboriginal rights, for example — lay within exclusive federal legislative authority. Not all federal measures validly enacted engage the core of some head of exclusive federal power: see, e.g., *General Motors of Canada Ltd. v. City National Leasing*, [1989] S.C.J. No. 28, [1989] 1 S.C.R. 641 (S.C.C.). In this instance, however, there is relevant context and history. In *Ordon Estate v. Grail*, [1998] S.C.J. No. 84, [1998] 3 S.C.R. 437 (S.C.C.) [hereinafter “*Ordon Estate*”], the Court held (at para. 68) that “Canadian maritime law is a body of federal law [*Constitution Act, 1867*, s. 91(10)], uniform across the country, within which there is no room for the application of provincial statutes” and (at para. 85) that “it is constitutionally impermissible for the application of a provincial statute to have the effect of supplementing existing federal rules of maritime negligence law in such a manner that the provincial law effectively alters rules within the exclusive competence of Parliament or the courts to alter.” In *Paul*, *supra*, note 3, the Court, relying on *Ordon Estate* (see, e.g., para. 15), held (at para. 19) that “[l]egislation that triggers the doctrine of interjurisdictional immunity purports to ... alter rights and obligations. Such inapplicable legislation may purport to ‘supplement’ existing federal rules,” but, *id.*, that the statutory grant of adjudicative jurisdiction to the British Columbia Forest Appeals Commission was constitutionally permissible because it did “not attempt to supplement or amend the constitutional

seems defensible, but one would have expected neither order of government to have any constitutional authority, let alone exclusive authority, unilaterally to provide for, alter or abolish *constitutional* rules, or their operation, respecting Aboriginal rights.¹⁴²

One relevant lesson from *NIL/TU,O*, therefore, appears to be that the Court is unsure of its ground when it comes to provincial authority and Aboriginal peoples, and perhaps when it comes to provincial authority and interjurisdictional immunity. We will never know (or at least not in time for the knowledge to help doctrinally), but it is, at the very least, possible that the majority in *NIL/TU,O* took such pains to decouple the functional test used in labour relations cases from the more generic doctrine of interjurisdictional immunity in order not to have to concern itself with the core of section 91(24) or to comment on the concurring judges' proposal in respect of that issue.

IV. NOTES TOWARD A CONVERSATION

At the close of 2010, therefore, we find ourselves, for present purposes, more or less where we were just before the *Canadian Western Bank* decision: with an interjurisdictional immunity doctrine that has refused to die and that continues to frustrate attempts to find a credible constitutional source for provincial power to infringe/impair, even when justified, existing treaty or Aboriginal rights. We are fated, a little longer at least, to dwell within a constitutional order that, to this extent, remains at war with itself.

I repeat that I have no ready solution. But one possible way of making progress when confronted with unacknowledged conflict between

and federal rules respecting aboriginal rights". The analogy from *Ordon Estate* on which the court relies in *Paul* holds only if Canadian Aboriginal rights law, like Canadian maritime law, "is a body of federal law, uniform across the country, within which there is no room for the application of provincial statutes". This conclusion would likely make more practical difference than it currently does if there were more of a body of federal law that deals with Aboriginal rights. To the best of my knowledge, there is, at present, no federal statute law that is expressly about Aboriginal rights. We do know, however, that the law of Aboriginal title is, by its nature, federal common law: see *Roberts v. Canada*, [1989] 1 S.C.R. 322 (S.C.C.).

¹⁴² See, e.g., *Nova Scotia (Attorney General) v. Canada (Attorney General)*, [1951] S.C.J. No. 32, [1951] S.C.R. 31 (S.C.C.) (neither order of government may transfer or delegate legislative authority to the other); *McEvoy v. New Brunswick (Attorney General)*, [1983] S.C.J. No. 51, [1983] 1 S.C.R. 704 (S.C.C.) (even acting in concert, provincial and federal legislatures cannot alter the judicature scheme, including the guarantees of judicial independence, set out in ss. 96-101 of the *Constitution Act, 1867*); *R. v. Dick*, *supra*, note 41, at 327-28 (Parliament may not prescribe unilaterally when its legislation renders provincial legislation inoperative).

contrary strands of doctrine is to explore the normative question that underlies the conflict. In this instance, the normative question concerns the kind of relationship that *ought* to subsist between provincial governments and Aboriginal communities bearing section 35 rights. One way of sharpening our intuitions for such a discussion is to consider what it would mean operationally if the courts were prepared, in the interest of jurisprudential consistency, to allow the doctrine of interjurisdictional immunity to have its effect, depriving provinces altogether¹⁴³ of independent authority to impair existing treaty or Aboriginal rights. Would such an outcome simply be constitutionally intolerable?

For purposes of the present discussion, I am going to make two assumptions. The first is that such an outcome, rightly or wrongly, would frighten much of mainstream Canada, including many governments and judges. My second assumption is that it would be unfair and inappropriate for our courts, on this account alone, to withhold accreditation from otherwise eligible claims of treaty or Aboriginal right. What options exist for managing relationships somewhat harmoniously in a setting that features both of these assumptions?

A sensible place to begin is by remembering that such a setting need not leave existing treaty or Aboriginal rights entirely unregulated. “Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*.”¹⁴⁴ We know, as well, that there are ways of involving provincial governments in the design and administration of regulatory regimes that govern core federal matters. Federal fisheries regulation in Ontario is an illustrative example. The *Fisheries Act*¹⁴⁵ authorizes regulations implementing the legislation; Canada has chosen to enact regulations specific to individual provinces or regions. To the best of my knowledge, the government of Ontario is, at a minimum, heavily involved in helping design the *Ontario Fishery Regulations, 2007* from time to time;¹⁴⁶ those regulations, in turn, repose considerable discretion in the Ontario Minister of Natural Resources and its officials in regard to the implementation, administration and enforcement of the federal scheme. In *Peralta*,

¹⁴³ Apart from those whose “laws respecting game” operate despite ordinary division of powers principles, pursuant to the Natural Resources Transfer Agreements and the *Constitution Act, 1930*. See discussion, *supra*, at note 4.

¹⁴⁴ *Sparrow*, *supra*, note 4, at 1109.

¹⁴⁵ R.S.C. 1970, c. F-14; now R.S.C. 1985, c. F-14.

¹⁴⁶ Currently SOR/2007-237.

the Ontario Court of Appeal¹⁴⁷ and the Supreme Court of Canada¹⁴⁸ each affirmed unanimously the constitutional legitimacy of this arrangement. Such arrangements, of course, depend for their effectiveness on political will, considerable intergovernmental cooperation and careful legislative and regulatory drafting; in other words, on voluntary embrace of the principles of flexible, cooperative federalism. But where such conditions obtain, there appears to be no constitutional impediment to extensive provincial involvement, under federal auspices, in the development, implementation and enforcement of regulations governing the exercise of section 35 rights, always assuming that the regulatory arrangements themselves meet the Supreme Court's tests for justification of measures or conduct that infringes such rights.¹⁴⁹

But whether or not the federal order elects to use its unquestioned power to regulate the exercise of section 35 rights, and whether or not, in doing so, it elects to involve the provinces in the design and enforcement of any such scheme, the courts already have means, if they choose to use them, by which to police the constitutionally protected scope of such rights. Consider the implications of two defining features of treaty and Aboriginal rights: that they are communal in character; and that they derive — explicitly in the case of Aboriginal rights,¹⁵⁰ indirectly in the case of treaty rights framed to preserve “usual” or “former” “habits”, “vocations” or “avocations” — from ascertainable customs, traditions and practices deemed to be of integral significance to the ways of life of particular right-bearing communities.

It is now well established that both treaty rights¹⁵¹ and Aboriginal rights¹⁵² are, by nature, communal and are available to individuals for exercise only by virtue of their membership in right-bearing communities or, exceptionally, with the prior permission of an Aboriginal community

¹⁴⁷ *Peralta v. Ontario*, [1985] O.J. No. 2304, 49 O.R. (2d) 705 (Ont. C.A.), aff'd [1988] S.C.J. No. 92, [1988] 2 S.C.R. 1045 (S.C.C.) [hereinafter “*Peralta*”].

¹⁴⁸ [1988] S.C.J. No. 92, [1988] 2 S.C.R. 1045 (S.C.C.).

¹⁴⁹ For the justification requirements for infringements of treaty rights and various kinds of Aboriginal rights, see *Sparrow*, *supra*, note 4, at 1108-11, 1113-19; *Badger*, *supra*, note 4, at paras. 82-85, 96-99; *Gladstone*, *supra*, note 29, at paras. 54-84; *Delgamuukw*, *supra*, note 4, at paras. 161-169.

¹⁵⁰ See, e.g., *R. v. Van der Peet*, [1996] S.C.J. No. 77, [1996] 2 S.C.R. 507, at paras. 44, 46 (S.C.C.).

¹⁵¹ *R. v. Marshall*, [1999] S.C.J. No. 66, [1999] 3 S.C.R. 533, at para. 17 (S.C.C.) [hereinafter “*Marshall I*”]; *R. v. Shipman*, [2007] O.J. No. 1716, 2007 ONCA 338, 85 O.R. (3d) 585, at paras. 43, 50 (Ont. C.A.) [hereinafter “*Shipman*”].

¹⁵² For Métis Aboriginal rights, see *R. v. Powley*, [2003] S.C.J. No. 43, 2003 SCC 43, [2003] 2 S.C.R. 207, at para. 44 (S.C.C.) [hereinafter “*Powley*”]; for other Aboriginal rights, see *Sappier*, *supra*, note 6, at para. 26; *R. v. Kapp*, [2008] S.C.J. No. 42, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 4 (S.C.C.).

other than one's own, to which the right belongs.¹⁵³ *Delgamuukw*¹⁵⁴ confirms that some such rights, at least, embody and protect a sphere of collective decision-making in respect of the subject matter of the right.¹⁵⁵ It is sensible to suppose that such collective decision-making typically manifests generically through contemporary interpretation and application of the customs, traditions and practices normative within a given community. Such customs, traditions and practices, therefore, can be said to prescribe the default conditions governing permissible participation in communal treaty or Aboriginal rights.

Jurisprudence from other Commonwealth countries has accepted this proposition explicitly. A body of New Zealand jurisprudence, for example, has emphasized that "the exercise of rights to fish" in traditional Maori communities "was circumscribed by well established criteria":

[that] the gathering of fish, although a well developed process and conditioned by centuries of experience and accumulated knowledge, was accompanied by rules emanating from tribal authority and practices and customs and no doubt adapted as the years went by to environment and requirements through time.¹⁵⁶

A more recent judgment of the High Court of Australia has this to say about the "privilege" of individual exercise of a communal native customary right:

[S]uch a finding [viz., that a community has a right to hunt estuarine crocodiles on its traditional lands] will not necessarily dispose of the question of whether a particular individual or sub-group within that community has the privilege to hunt estuarine crocodiles. The nature and scope of the privileges in question will vary with the traditional laws and customs of the particular community so as to accord with the

¹⁵³ See, e.g., *Shipman*, *supra*, note 151; *R. v. Meshake*, [2007] O.J. No. 1714, 2007 ONCA 337, 85 O.R. (3d) 575 (Ont. C.A.).

¹⁵⁴ *Supra*, note 4.

¹⁵⁵ See *id.*, at paras. 115, 166, 168 (decisions with respect to Aboriginal title land are made by the title-holding community). At para. 168, the Court says that the "aboriginal right to fish for food, by contrast, does not contain within it the same discretionary component". If what the Court means is that a right to fish for food cannot, as such, authorize a community to harvest fish for uses other than food, one can hardly disagree. Given the context in which the issue arose in *Delgamuukw*, *id.*, it seems unnecessary to suppose that the Court meant anything more by this observation.

¹⁵⁶ See, e.g., *R. v. Campbell*, [1989] D.C.R. 254, at 271 and 269 (N.Z. Dist. Ct.). Compare, e.g., *Te Weehi v. Regional Fisheries Officer*, [1986] 1 N.Z.L.R. 680, at 682-83, 692-93 (H.C.).

distinct social structure and patterns of occupancy and use of the land of that indigenous community.¹⁵⁷

Closer to home, the Ontario Court of Appeal has already held that “[i]n Aboriginal custom, protection and conservation of harvesting resources is paramount” and that “[a]ny departure from this aspect of Aboriginal custom would probably negative any consent” that an outsider from a different Aboriginal community might receive to share in the exercise of the home community’s treaty or Aboriginal harvesting rights.¹⁵⁸

These doctrinal foundations equip Canadian courts to hold, if they choose, that no individual may invoke the protection of an existing treaty or Aboriginal right for particular conduct unless he or she can show that the relevant conduct either: (1) conforms with the norms and principles internal to the right-bearing community that inform and define the relevant right; or (2) has the approval — the prior approval, *Shipman* suggests¹⁵⁹ — of the governing authorities of the community to which the right belongs in the relevant geographic area. Such an approach would have at least two salutary consequences. On the one hand, it would afford a check against the frolics of rogue members of right-bearing Aboriginal communities by requiring, as a prerequisite for constitutional protection of the conduct impugned, that the community itself acknowledge some responsibility for community members¹⁶⁰ and for their conduct. On the other hand, it would require the mainstream legal order to accept that certain rights it explicitly recognizes and

¹⁵⁷ *Yanner v. Eaton*, [1999] HCA 53, 201 C.L.R. 351, at para. 74, *per* Gummow J. (concurring).

¹⁵⁸ *Shipman*, *supra*, note 151, at para. 45. See also *id.*, at para. 51.

¹⁵⁹ *Shipman*, *id.*, at para. 50:

First, as I said, treaty rights are communal; any consent that may be granted must reflect respect for the community of treaty rights holders, which means that any consent granted to share the harvesting resource must weigh and consider the communal interest. In order to properly do this, the person capable of granting the consent would normally require the request in advance.

See generally *id.*, at paras. 49-53.

¹⁶⁰ We know from *Powley*, *supra*, note 152, that “accept[ance] by the modern community ... an objective demonstration of a solid bond of past and present mutual identification and recognition of common belonging between the claimant and other members of the rights-bearing community” is a condition precedent for eligibility to exercise the Aboriginal rights of a Métis community: *id.*, at para. 33 (emphasis in original). Although, to the best of my knowledge, the courts have not yet addressed the issue, it is reasonable to suppose that a comparable prerequisite governs individuals’ eligibility to exercise the s. 35 rights of Indian or Inuit communities.

affirms entail, and in this respect depend upon, a dimension of Aboriginal self-government.¹⁶¹

But limits that flow from communities' own understandings and ways of ordering integral shared activities are not the only available tools for judicial constraint on the constitutionally protected scope of section 35 rights. Recall the well-known proposition that treaty rights to hunt do not protect the right to hunt unsafely. In *Morris*,¹⁶² for instance, the majority said that "it could not have been within the common intention of the parties [to the 1850 *Douglas Treaties*] that the Tsartlip would be granted a right to hunt dangerously, since no treaty confers on its beneficiaries a right to put human lives in danger".¹⁶³ This conclusion derived neither from close textual analysis of the *Douglas Treaties*, nor from research into the negotiations that led to those treaties; it derived from a shared sense that such a treaty right simply would not do in Canadian law: that the Crown, acting rationally, could never agree to such a thing. The same is true in each of the other decisions I have found that deemed safety to be an internal limit on the permissible exercise of treaty rights to hunt.¹⁶⁴ In essence, these decisions appear to be saying, though in different words, that it would be contrary to public policy to extend constitutional protection to unsafe activity.

Consider now *Myran*,¹⁶⁵ the first Supreme Court decision that, to my knowledge, dealt with public safety and the hunting rights of Aboriginal peoples. At issue there was not a hunting right set out in a treaty, but the hunting right prescribed and preserved in paragraph 13 of the *Manitoba*

¹⁶¹ This is not the place to discuss in detail possible constitutional rights of self-government. Suffice it for present purposes to note that the Supreme Court of Canada appears to have left at least slightly ajar the door to eventual accreditation of self-government rights (see *R. v. Pamajewon*, [1996] S.C.J. No. 20, [1996] 2 S.C.R. 821, at paras. 24-25 (S.C.C.); *Delgamuukw*, *supra*, note 4, at paras. 170-171) and the British Columbia Supreme Court has upheld the validity of the Nisga'a Treaty in part because it preserves and codifies pre-existing self-government rights that the Nisga'a already had: see *Campbell v. British Columbia (Attorney General)*, [2000] B.C.J. No. 1524, 189 D.L.R. (4th) 333 (B.C.S.C.).

¹⁶² *Supra*, note 21.

¹⁶³ *Id.*, at para. 35, *per* Deschamps and Abella JJ. (for the majority). Compare *id.*, at para. 110, *per* McLachlin C.J.C. and Fish J. (dissenting on other grounds).

¹⁶⁴ See, e.g., *Simon*, *supra*, note 21, at 403 ("it is implicit in the right granted under article 4 of the Treaty of 1752 that the appellant has the right to possess a gun and ammunition in a safe manner in order to be able to exercise the right to hunt"); *R. v. Paul and Paul*, [1987] N.B.J. No. 194, 80 N.B.R. (2d) 1, at para. 28 (N.B.Q.B.) (relying on *Simon*, *id.*); *R. v. Napoleon*, [1985] B.C.J. No. 2070, [1985] 6 W.W.R. 302, at 310 (B.C.C.A.) ("It is implicit in Treaty Number 8 that the obligation to hunt safely applies throughout the areas where hunting is permitted by the treaty"); *R. v. McCoy*, [1993] N.B.J. No. 597, 109 D.L.R. (4th) 433, at 437-38 (N.B.C.A.) (relying on *Simon*, *id.*, and *R. v. Paul and Paul*, *id.*).

¹⁶⁵ *Myran v. R.*, [1975] S.C.J. No. 69, [1976] 2 S.C.R. 137 (S.C.C.) [hereinafter "*Myran*"].

Natural Resources Transfer Agreement,¹⁶⁶ a constitutional instrument. Dismissing an appeal from conviction on provincial unsafe hunting charges, the Court concluded that there is “no irreconcilable conflict” between the right and the statutory requirement “that such right be exercised in a manner so as not to endanger the lives of others”.¹⁶⁷ “Inherent in the right,” the Court said, quoting with approval from the judgment in the court below, “is the quality of restraint, that is to say that the right will be exercised reasonably.”¹⁶⁸

This principle — that “the quality of restraint” inheres in the constitutional rights of Aboriginal peoples — is susceptible to generalization beyond issues of safety and rights to hunt. It could give the courts permission to read down existing treaty or Aboriginal rights where necessary to construe them “in a manner consistent with the fundamental values enshrined in the Constitution”.¹⁶⁹ (Such a course would be quite consistent with the rule in English law that “a custom to be valid must be such that, in the opinion of a trained lawyer, it is consistent, or, at any rate, not inconsistent, with those general principles which, quite apart from particular rules or maxims, lie at the root of our legal system.”)¹⁷⁰ Further work, of course, would be needed to identify any relevant “fundamental values” and to determine when it is apposite for the courts to invoke them. Species and habitat conservation might, however, deserve at least some consideration as possible reasons to invoke “the quality of restraint”.¹⁷¹

¹⁶⁶ Schedule 1 to the *Constitution Act, 1930*.

¹⁶⁷ *Myran, supra*, note 165, at 142.

¹⁶⁸ *Id.* Special thanks to Kristina Gill for calling this to my attention.

¹⁶⁹ *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] S.C.J. No. 75, [1986] 2 S.C.R. 573, at 603 (S.C.C.); *R. v. Salituro*, [1991] S.C.J. No. 97, [1991] 3 S.C.R. 654, at 675 (S.C.C.).

¹⁷⁰ *Johnson v. Clark*, [1908] 1 Ch. 303, at 311.

¹⁷¹ Space does not permit a thorough discussion of this suggestion here. Suffice it for now to say that argument supporting it would have to be crafted with care. In *R. v. Kruger*, [1978] S.C.J. No. 43, [1978] 1 S.C.R. 104 (S.C.C.), the Supreme Court expressed some displeasure at the prospect that a province might “act ... in such a way as to oppose conservation and Indian claims to the detriment of the latter”. And on at least two more recent occasions in — *Simon, supra*, note 21, at 413, and in *Badger, supra*, note 4, at paras. 90-94, the Court has held that particular provincial measures acknowledged to have been enacted for conservation purposes can and do conflict with, infringe, existing treaty rights to hunt. From this, it follows that conservation *as defined by the province* is not, as such, an internal limit on the reach of these rights. There may still be room to argue, however, that “reasonable” exercise of such rights does not include conduct inconsistent with basic conservation imperatives *as defined by the courts*, independent of provincial conservation policy. Certain forms and concentrations of harvesting activity, in other words, might be perceived to be so clearly unacceptable that no treaty or Aboriginal right cognizable in Canadian law could be deemed to countenance them.

The significance for present purposes of both kinds of internal limits on treaty or Aboriginal rights — those that derive from a community's own understanding of its customs and those that derive from judicial intuitions about public policy — is that they would render certain kinds of unwelcome conduct subject to relevant provincial law, even if the perpetrator belonged to a right-bearing Aboriginal community and even if the provinces have no capacity to impair section 35 rights or their exercise. "Valid provincial laws that fall outside the scope of the treaty [or Aboriginal] right, by virtue of an internal limit on the treaty [or Aboriginal] right, do not go to 'core Indianness' and thus apply *ex proprio vigore*."¹⁷²

The preceding discussion appears to suggest that the sky need not fall if the provinces turn out not to have independent constitutional authority to impair existing treaty or Aboriginal rights or their exercise. There are several ways, alone or in combination, in which the Canadian constitutional order might, even then, accommodate such rights responsibly. It need not find ways, on that account, of screening out all but the most innocuous candidates.

I do not pretend that this settles the issue. At most, it offers some options for going on within a constitutional order that continues to feature interjurisdictional immunity and is not able to conjure any doctrinally stable explanation for exempting treaty or Aboriginal rights from the application of that principle. My hope is that they offer material for the normative conversation I believe we need to have about the kind of relationship that ought to exist in Canadian law between provinces and right-bearing Aboriginal communities.¹⁷³

We all have a stake in resolution of the current doctrinal impasse over provincial capacity to infringe section 35 rights. There are times, as

¹⁷² *Morris*, *supra*, note 21, at para. 100, *per* McLachlin C.J.C. and Fish J. (dissenting on other grounds). Compare *R. v. Marshall*, [1999] S.C.J. No. 55, [1999] 3 S.C.R. 456, at para. 61 (S.C.C.) [hereinafter "*Marshall I*"], *Marshall II*, *supra*, note 151, at paras. 36-39.

¹⁷³ If those options seem unpalatable, a final additional option — amending the Constitution itself — may warrant at least some attention. If *Kitkatla*, *supra*, note 22, and *Morris*, *supra*, note 21, are any indication of the federal position, this is an instance in which provincial and federal interests would align; both would favour ensuring provincial capacity, subject to justification, to constrain s. 35 rights to the point of infringement. (In both appeals, Canada supported the province's claims of authority: see *Kitkatla*, *id.*, at para. 72; *Factum of the Intervener the Attorney General of Canada, Ivan Morris and Carl Olsen v. Her Majesty the Queen* (August 3, 2005), at para. 45.) Any such proposal would require a prior constitutional conference involving first ministers and "representatives of the aboriginal peoples of Canada": *Constitution Act, 1982*, s. 35.1, added by the *Constitutional Amendment Proclamation, 1983*, SI/84-102. But in the present circumstances, such a conference hardly seems a bad thing, with or without the prospect of a constitutional amendment. This is an issue that deserves, and appears to require, cooperative collective deliberation.

St. Paul¹⁷⁴ and Justice Binnie¹⁷⁵ have each acknowledged, when we have no choice except to see things “as through a glass, darkly”, but this, with great respect, is not one of them. And this may well be one of the surprisingly frequent occasions in law when having an answer is more important than what the answer is.

¹⁷⁴ I Corinthians 13:12.

¹⁷⁵ *Marshall I*, *supra*, note 172, at para. 3.